No. 3685

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLAF HAUGE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court for the District of Oregon

LESTER W. HUMPHREYS,
United States Attorney for Oregon,
For Defendant in Error.

No. 3685

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLAF HAUGE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court for the District of Oregon

LESTER W. HUMPHREYS,
United States Attorney for Oregon,
For Defendant in Error.

INDEX.

STATEMENT

This is a proceeding to review a conviction for false swearing at a naturalization hearing.

Olaf Hauge was a resident alien, not an enemy, who claimed exemption from military service on that ground. He was admitted to citizenship at a hearing held June 17, 1920, in the United States District Court of Portland. At this hearing, Hauge testified that he had not claimed exemption on the ground of alienage. Soon after, the Naturalization Examiner discovered that Hauge had, in fact, claimed such exemption. Thereupon a rehearing on Hauge's application for citizenship was asked and allowed.

The rehearing was held in August, 1920. Hauge again took the witness stand and admitted under oath that his testimony on June 17, 1920, was to the effect that he had not claimed exemption.

Afterwards he was indicted for swearing falsely at the original hearing as to his claim for exemption. At the trial there was an issue as to what Hauge had said under oath at that original hearing. There was direct testimony on this point from the Clerk of the Court. In corroboration evidence was offered of Hauge's admission under oath at the rehearing. That evidence was received and its reception is assigned as error.

There was offered also at the trial, a statement in writing made by Hauge to the Naturalization

Examiner in connection with his petition for naturalization. In this writing, Hauge stated again that he had not claimed exemption on the ground of alienage. This was received as "Exhibit 1" and its admission is assigned as error.

When the government rested, defendant moved for a directed verdict on the ground that it was not material at the naturalization hearing whether defendant had claimed exemption as an alien. This motion was denied and the ruling is assigned as error.

Defendant's wife was refused permission to testify in his behalf and this ruling is assigned as error.

After defendant had produced six witnesses who said his reputation for truth and veracity was good, the Court refused to permit further cumulative testimony on this point and such prospective witnesses were excluded, and this ruling is assigned as error.

POINTS AND AUTHORITIES

I.

(a) Admissions against the interest of a defendant are competent against him at a criminal trial.

16 C. J. 626-629.
Pass vs. United States, 256 Fed. 731-732.
Wine vs. U. S., 260 Fed. 911.
Adamson vs. U. S., 184 Fed. 714-715.

(b) Such admissions are not within the rules for the impeachment of witnesses.

16 C. J. 626.
Adamson vs. U. S., 184 Fed. 714-715 (Certierari denied 220 U. S. 612).

II.

An alien, not an enemy, who had declared his intention to become a citizen, and then claimed exemption from the military service on the ground of being an alien, is not eligible to citizenship.

In re Tomarchio, 269 Fed. 400-408-411.
In re Silberschutz, 269 Fed. 398-399.
In re Loen, 262 Fed. 166-167.
In re Miegel, 272, Fed. 688-696.
In re Rubin, 272 Fed. 697.

III.

The wife of a defendant is not a competent witness in his behalf, irrespective of the kind of testimony she might give.

Jin Fuey Moy vs. U. S., 254 U. S. —; 41 Sup. Ct. Rep. 98-100.
Hendrix vs. U. S., 219 U. S., 79-91.

IV.

It is within the discretion of the trial court to exclude evidence which is merely cumulative.

Samuels vs. U. S., 232 Fed. 536-543 .
O'Hara vs. U. S., 6 Fed. 551-555.
Chapa vs. U. S., 261 Fed. 775-776.

ARGUMENT.

I.

The Admissions of Defendant.

Defendant was indicted for false swearing at a naturalization hearing. He pleaded not guilty. The government was thereby required to prove its case. The indictment (Trans. 6) charges that defendant falsely swore he "did not make or assert in said questionnaire any claim for exemption from the military service of the United States by virtue of his alienage, foreign citizenship, or the fact that he was not a citizen of the United States."

The prosecution therefore had to prove (1) that defendant testified as charged in the indictment; and (2) that such testimony was false. In order to prove that defendant so testified, the Government relied, first, on the direct evidence of the Clerk of the District Court, and second, on the admissions of the

defendant. These admissions were solemn statements under oath in open court on the occasion of the rehearing of defendant's naturalization petition. At this rehearing, defendant on the witness stand admitted that at the original hearing, he had testified that he had not claimed exemption from military service on the ground of alienage. (Trans. 24).

The courts uniformly hold such admissions to be competent against a defendant. Such admissions are not within the rules for the impeachment of witnesses. Authority might be cited interminably in support of this proposition. The rule has been so often stated and so generally accepted that I believe it will be sufficient to quote the rule as stated in Corpus Juris under the title Criminal Law, 16 C. J. 626 (Section 1243).

> "Statements and declarations by accused, before or after the commission of the crime, although not amounting to a confession, but from which, in connection with other evidence of surrounding circumstances, an inference of guilt may be drawn, are admissible against him as admissions. Such statements and declarations are original evidence, and may be introduced without laying the foundation which is necessary when it is sought to impeach a witness."

Again, it is said in 16 C. J. 629 (Section 1248.)

> "In the absence of statutory regulation of the subject, testimony and written statements given

voluntarily or made by a party or witness in a judicial proceeding are, as admissions, competent against him in a trial of any issue in a criminal case to which they are pertinent."

In the case of Pass vs. U. S. (9th C. C. A.), 256 Fed. 731-732, the principle is recognized and applied.

In case of Wine vs. U. S. (8th C. C. A.), 260 Fed. 911, objection was made to the introduction of letters written by defendant, and the court said:

"These letters contain admissions of the defendant against his interest at this trial and there was no error in over-ruling the objection to their admission."

In the case of Adamson vs. U. S. (8th C. C. A.), 184 Fed. 714-715, objection was made to proving a statement of one of the defendants. The court said:

"We need not stop to consider this as impeaching testimony. The statements by Sullivan were against interest, and could have been proved without his previous denial."

A writ of certiorari in this case was denied by the Supreme Court, 220 U. S. 612.

"EXHIBIT 1"

Much is said by defendant's counsel about the written answers of Hauge to the naturalization examiner (Exhibit 1). This is a writing containing statements against the interest of the defendant in this prosecution; it is an act in preparation of the

perjury he committed; and shows a deliberate purpose to achieve naturalization by deception.

It is a form used by the Department of Labor in the ordinary course of naturalization proceedings. Hauge was an applicant for citizenship; he regularly filed a petition for naturalization. The naturalization examiner in charge at Portland is Mr. Tomlinson. Upon the filing of Hauge's petition for naturalization, and before the hearing, Mr. Tomlinson "as Naturalization Examiner, sent to the defendant, by mail, a typewritten or printed blank form of questions to be answered by the defendant as an applicant for naturalization. . . . Prior to the 17th day of June, 1920, the defendant wrote answers in the aforesaid blank form sent him by the Naturalization Examiner and returned the same by mail to the Naturalization Examiner" (Trans. 25).

This form has defendant's signature. His signature appears frequently on the questionnaire (Exhibit 2). There was abundant opportunity for the jury to compare the signatures, if there were any question as to the validity of Exhibit 1.

The fact that defendant wrote the answers in Exhibit 1 and transmitted it to the Naturalization Examiner is sufficiently shown by the foregoing. In Exhibit 1, over the defendant's signature, are the following questions and answers:

"Did you file a questionnaire with any draft

board during the war?

"Yes.

"Did you claim exemption from the military service because you were not a citizen of the United States?

"No."

An issue before the jury was whether defendant testified on June 17, 1920, that he had not claimed exemption. On this issue, Exhibit 1 corroborates the testimony of the clerk of the court. It is a preliminary writing made by defendant in the course of the same naturalization proceeding, preparatory to his hearing before the court. It shows an act of defendant preparatory to his perjury in open court, and touches the probabilities of the case—for it is not likely that defendant, in preparing for his hearing, would say in writing to the examiner in charge that he had not claimed exemption, and would afterward, in open court in the presence of the examiner, tell a different story on the witness stand. It also shows knowledge of defendant, and precludes the possibility that his false testimony was attributable to a momentary lapse of memory. It shows that defendant was ready to accomplish his naturalization by deception as to his claim for exemption.

I submit, therefore, that Exhibit 1 is competent because it is shown to be in defendant's handwriting and to be signed by him; and to have been done in the

ordinary course of the naturalization proceeding here in question. And it is relevant and material because it corroborates the evidence of the Government and tends to show, taken in connection with the questionnaire (Exhibit 2), that defendant's testimony was knowingly false. Whether Exhibit 1 was sent by mail, or the postage prepaid, or the envelope franked, is quite beside the point. No question touching the use of the mail arises in this case. We do not have to call to aid any presumptions as to deposit of mail matter and its regular delivery in due course. Exhibit 1 was filled out and signed by defendant, and delivered to the examiner. It would have had the same effect had Hauge filled it out in the office of the examiner and left it there.

II.

Was the Claim for Exemption Material?

The opportunity to become a citizen of the United States is a privilege and not a right. The privilege of citizenship is extended to those aliens, otherwise qualified, who are attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. It is axiomatic that he who is inspired with that attachment for this country which citizenship requires, is also willing to serve and defend it. If the willingness to serve is wanting, it follows that the good disposi-

tion toward the country's good order and happiness is absent. Hauge was unwilling to serve. When America called for defenders, he hid from her behind his alien birth; and in order to be sure of escaping military service, he added a couple of other claims for exemption to that of alienage. (Trans. 26, III.)

In the case of In re Tomarchio, 269 Fed. 400-408, the court quotes the act of Congress, which is quoted by Hauge's counsel at page 15 of his brief, and then said:

> "But this was merely declaratory of the law. It neither added to, nor detracted from, the power inherent in the courts under the naturalization laws to hold a plea of alienage in bar to the performance of military service operated likewise as a bar to admission to citizenship. The bona fides of the intent and desire of an applicant for American citizenship constitutes one of the salient and material issues involved in a naturalization proceeding. The attitude, conduct and actions of a candidate, as disclosed in his questionnaire, are matters that must be taken judicial notice of, in a naturalization proceeding; and where in such questionnaire the petitioner is shown to have anywhere claimed exemption from military service on the ground of alienage, he is not eligible or qualified to be, nor should be admitted to American citizenship. The courts seem to be in more or less uniformity as to this.

Judge Dyer said further, in the same case, page 411:

> "As to friendly aliens, nationals of the countries associated with the United States in the World War, and as to neutral aliens, any plea of alienage set up by them must be held to be a deliberate attempt to evade military service altogether. . . . It is immaterial for naturalization purposes where in the questionnaire such claim was set up, or the manner in which it was asserted. If made by him anywhere, in any manner, that fact must necessitate the denial of the application for citizenship."

The same judge held in Re Silberschutz, 269 Federal, 398-399, that an Austro-Hungarian who had declared his intention to become a citizen in 1915 and who claimed exemption from military service on the ground that he was an alien enemy, could not be admitted to citizenship. The court said:

> "Further, the assertion by the petitioner of this claim for exemption as an alien establishes that he was not, during all of the period of five years immediately preceding the date of filing of his petition for naturalization, attached to the principles of the Constitution of the United States of America, and that he was not well disposed to the good order and happiness of the same, and that he was not willing in the hour of our national peril to support and defend the Constitution of the United States of America

against all enemies, foreign and domestic, and bear true faith and allegiance to the same."

In the case of In Re Loen, 262 Federal, 166-167, a native of Norway had declared his intention to become a citizen. He took advantage of the privilege created by the Act of July 9, 1918, and surrendered his declaration of intention for the purpose of evading military service. He afterward served in the Army at a training camp and later applied for citizenship. The court said:

"In the instant case, the applicant had declared his intention to become a citizen, and under oath declared his willingness to renounce all allegiance to foreign sovereignty. By that oath he solemnly swore it to be his bona fide intention to transfer his citizenship and allegiance. This implied willingness and intention to defend the flag and to support the Constitution and laws of the United States; and when invitation was extended, he declined to do so, thereby repudiating his declared intention, and asserted under oath preference for his native country. He failed to meet the test. Nothing appears to indicate a change of sentiment or feeling of regret.

"Citizenship and allegiance to this country are made of sterner stuff. He is not fitted to take the oath of allegiance. Interpretation of the oath of allegiance is more than a mere formula of words. It is the translation of the alien applicant for citizenship from foreign language,

foreign history, foreign ideals and foreign loyalty into a living character of our language, of our history, of our life, of our ideals, and loyalty to our flag. It is that intellectual, spiritual, patriotic development of love for the United States, his adopted country, and its constitution and laws, which moves him in sincerity to dedicate his life to its service, and conscientiously agree to defend it against all enemies and the implanting in his soul of a sincere determination that in the hour of danger or attack upon the constitution or the flag, to devote to their defense and support unlimited loyal service to the extent of his life, if required. Any person unwilling to pledge his hands, his heart, his life, to the service and preservation of the government of the United States, first and always, is unworthy to be admitted to citizenship.

"The proof does not show the applicant's loyalty to our flag and his willingness to defend it. This applicant, when the flag was assaulted by a foreign foe, was unceasing in his efforts to evade military service in a conflict forced upon this country, and did nothing which would indicate that he was attached to the principles of the Constitution of the United States, carrying forward liberty, equality, justice and humanity. It was not until all danger was past, when the armistice was signed, that he made up his mind to again knock at the door of this country, and ask to be admitted to citizenship.

"This application is denied with prejudice."

In the case of In re Miegel, 272 Fed. 688-696, Judge Tuttle, speaking of aliens, not enemy aliens, said:

> "Not only were such aliens free to avail themselves of the opportunity and right to take their places among the ranks of the military defenders of this country, but it was their solemn duty, under the law and according to all of the dictates of patriotism, to respond to the call of the nation, in its great emergency, to take up arms in its defense. No argument is needed to make it clear and obvious that an American citizen who is unwilling to fight for his country, at whatever sacrifice to himself, is unfit to be an American citizen. . . .
>
> "All this is applicable, with equal force, to the alien who, having solemnly declared his intention to become a citizen of this country, and having been granted an opportunity, and indeed required, to fulfill the most important and essential obligation that a citizen or prospective citizen owes to the nation when summoned to defend it from its enemies on the field of battle, fails in this supreme test of loyalty, and not only attempts to escape from such obligation but to present a false pretext for such attempted escape. That such an alien is not attached to the principles of the Constitution of the United States and is not well disposed to the good order and happiness of the same is too plain for fur-

ther discussion. An alien seeking citizenship, who thus shows that he is not willing to assume and bear the duties and obligations of that status, as well as to enjoy its rights and privileges, is not qualified or entitled to become an American citizen."

It thus appears, as a matter of law, that the question whether Hauge had claimed exemption was material; because had the truth been disclosed, it would have revealed Hauge to be ineligible to citizenship, and his application would have been denied on the original hearing. Therefore his testimony was false as to a material fact; and the motion for a directed verdict was properly denied.

IV.

Defendant's Wife as a Witness.

The wife of a defendant is not a competent witness. This is held squarely by the Supreme Court in Jin Fuey Moy vs. U. S., 254 U. S. —; 41 Sup. Ct. Rep. 98-100. Defendant's counsel in his brief has misstated the ruling of the Supreme Court (Brief 11, IV). Counsel states, as the ruling of the court, the contention made before the court in behalf of Jin Fuey Moy, and rejected by the court. The language of the Supreme Court is as follows:

"But a single point remains—hardly requiring mention—the refusal to permit defendant's wife to testify in his behalf. It is conceded she

> was not a competent witness for all purposes, a wife's evidence not having been admissible at the time of the first Judiciary Act, and the relaxation of the rule in this regard by Sec. 858, Rev. Stat. U. S., being confined to civil actions. Logan vs. U. S. 144 U. S. 263-299-302; Hendrix vs. U. S. 219 U. S. 79-91. But, it is said, the general rule does not apply to exclude the wife's evidence in the present case because she was offered not 'in behalf of her husband,' that is, not to prove his innocence, but simply to contradict the testimony of particular witnesses for the Government who had testified to certain matters as having transpired in her presence. **The distinction is without substance. The rule that excludes a wife from testifying for her husband is based upon her interest in the event and applies irrespective of the kind of testimony she might give."**

In the case of Hendrix vs. United States, 219 U. S., 79-91, defendant was convicted of murder and prosecuted an appeal to the Supreme Court. The Court said:

> "It is assigned as error that the wife of Hendrix was not allowed to testify in his behalf to certain matters which, it is contended, were vitally material to his defense. The ruling was not error."

Counsel goes from eloquence to vehemence in discussing the reasonableness of this rule of law. It does

not appear that it is in order to discuss here the reasonableness of the law as declared by the Supreme Court of the United States.

V.

Limiting the Number of Witnesses.

The only remaining assignment of error relates to the action of the court in limiting the number of witnesses who would testify that defendant's reputation for truth and veracity was good. It is a fundamental rule of law that it is within the discretion of the trial court to exclude evidence which is merely cumulative.

In the case of Samuels vs. United States, 232 Federal, 536-543, there was a prosecution for fraudulent use of the mails. The Court limited the number of witnesses offered by defendant to prove that they had been cured by defendant's preparation. The Court said:

> "At best this evidence was merely cumulative and it was a matter of discretion for the trial judge to determine whether any more witnesses would be permitted to testify after forty-one witnesses had done so. This is a matter which must be left to the discretion of the trial judge and unless it appears clearly that there had been an abuse of the discretion which was prejudicial to the defendant, the Appellate Court will not consider it cause for reversal."

In the case of O'Hara vs. United States, 6th

Federal, 551-555, it is held that it was within the discretion of the trial court to limit the number of defense witnesses to be subpoenaed at the Government's expense to four on each particular point named in defendant's praecipe.

In the case of Chapa vs. United States, 5th C. C. A., 261 Federal, 775-776, there was a prosecution for fraudulent use of the mail. The Court said:

> "The seventh assignment of error is to the refusal of the Court to permit more than thirteen witnesses for the defendants to testify that they had been cured by defendants' daughter. This was material on the ground of defendants' good faith as showing their belief in the possession by their daughter of occult power claimed for her. About 150 witnesses were tendered on this point. Evidence offered was purely cumulative. . . . It is discretionary with a trial court to limit the amount of cumulative evidence and in this case it does not appear that this discretion was abused."

The question, therefore, is, was there an abuse of discretion in limiting defendant's character witnesses to six. The records make no showing of abuse. The four witnesses who were excluded would have testified to acquaintance with defendant over the same period of time as that described by the witnesses who testified and also that his reputation for truth and veracity was good.

It cannot be said as a matter of law that there was an abuse of discretion. So far as the record discloses, defendant suffered no injury. Defendant's reputation was not attacked by the government. Certainly defendant could not be prejudiced by cutting off cumulative testimony on a point which was not disputed.

Respectfully submitted,

LESTER W. HUMPHREYS,

United States Attorney.